

10 PERC ¶ 17066

UNIVERSITY OF CALIFORNIA (BERKELEY)

California Public Employment Relations Board

California State Employees' Association, Chapter 41, and Michael Bogan, Charging Parties, v. Regents of the University of California (Berkeley), Respondent.

Docket No. SF-CE-46-H

Order No. 534a-H

March 12, 1986

Before Hesse, Chairperson; Morgenstern, Burt, Porter and Craib, Members

Discrimination -- Discharge -- Intimidation Of Fellow Workers -- 72.311, 72.314, 72.323, 72.355 PERB declined to reconsider decision, 9 PERC 16239 (1985), in which it concluded that university lawfully discharged employee on basis of his ill-mannered behavior toward fellow employees.

Reconsideration -- Basis -- Dictum -- 71.9 Where there was no showing of prejudice, PERB declined to reconsider unfair practice decision on basis of dicta contained in such decision.

APPEARANCES:

Michael Bogan, on his own behalf; Claudia Cate, Attorney for the Regents of the University of California (Berkeley).

DECISION

The Public Employment Relations Board (PERB or Board), having duly considered the requests for reconsideration of PERB Decision No. 534-H filed by both Michael Bogan¹ and the Regents of the University of California at Berkeley (University), hereby denies those requests.

DISCUSSION

In the underlying Decision, PERB dismissed charges brought by Bogan and the California State Employees' Association, Chapter 41 alleging that the University had discharged and then banned Bogan from certain library premises in retaliation for engaging in protected activities. The Board found the administrative law judge's findings of facts and conclusions of law to be free from prejudicial error and adopted his proposed decision as that of the Board itself. Thus, the Board agreed that Bogan had failed to prove a prima facie case of retaliatory treatment by a preponderance of the evidence. We also agreed that, even if Bogan had established a prima facie case, the University had successfully rebutted it by showing it would have discharged and banned him regardless of any protected activities. The Board rejected the University's request to give collateral estoppel effect to findings of the arbitrator.

PERB Regulation 32410(a)² provides, in pertinent part:

Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision. . . . The grounds for requesting reconsideration are limited to claims that the decision of the Board itself contains prejudicial errors of fact, or newly discovered evidence or law which was not previously available and could not have been discovered with the exercise of reasonable diligence.

Bogan gives the following grounds for his motion for reconsideration: the Board did not resolve the question of the use of solicited complaints held in secret files; it illogically based its decision on credibility determinations while denying the need for such determinations; it failed to consider the bad precedential effect of allowing an employer to maintain and use secret files to discharge a union activist; it failed to correct factual errors and omissions contained in the adopted proposed decision, and it failed to discuss the restated prima facie case and evidence of reprisal contained in charging parties' briefs and exceptions to the proposed decision.

The Board has previously held that the mere reassertion of arguments considered and rejected by the Board in an underlying decision do not constitute the kind of "extraordinary circumstances" that justify granting reconsideration. See *State of California (Dept. of Developmental Services, Napa State Hospital) (Matta)* (1984) PERB Decision No. 378a-S; *Pittsburg Unified School District* (1984) PERB Decision No. 318a; *Rio Hondo Community College District* (1983) PERB Decision No. 279a.

Inasmuch as Bogan's motion is based on arguments and evidence previously presented and considered by the Board when it made its determination in the underlying Decision, no extraordinary circumstances are shown which justify reconsideration of that decision.

The University requests the Board to reconsider and delete dicta indicating PERB's unwillingness to give collateral estoppel effect to findings of an arbitrator. Its request is apparently grounded in its concern that, although the Board's statement is dicta, someone may attempt to utilize it as authority for not granting collateral estoppel in a future case. We note, however, that no prejudice to the University is shown. The Decision did not turn on that language and, were it deleted, the result would still be the same--in the University's favor. Thus, the University has not shown proper grounds for reconsideration.

ORDER

The requests for reconsideration made by Michael Bogan and the Regents of the University of California at Berkeley in Case No. SF-CE-46-H are hereby DENIED.

1 The California State Employees Association, Chapter 41 is not a party to this request for reconsideration.

2 PERB Regulations are codified at California Administrative Code, title 8, section 31001 et seq.
